A1

ADVICE TO INTERNATIONAL PASSENGERS ON L

Passengers on a journey involving an ultimate destinati
that the provisions of a treaty known as the Warsaw Co
entirely within the country of origin or destination. P
place in the United States of America, the convention a
that the liability of British Overseas Airways Corpora
death of or personal injury to passengers is limited in
per passenger, and that this liability up to such limit st
passengers travelling by a carrier not a party to such
stopping place in the United States of America. Liabili
in most cases to approximately $8,300 or US$
The names of carriers parties to such special contrac
examined on request.
Additional protection can usually be obtained by expr
altered by any limitation of the carrier's liability as
For further information please consult your airline or

NOTE

The limit of liability of Seventy-five Thousand
except that in case of a claim brought in a State
Courts, the limit shall be the sum of fifty thousa

JUL 18 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 70

ALITALIA-LINEE AEREE ITALIANE, S.p.A.,

Petitioner,

—v.—

JOHN LISI, *et al.*,

Respondents.

REPLY BRIEF OF PETITIONER TO THE MEMORANDUM FOR THE UNITED STATES AS *AMICUS CURIAE*

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The Solicitor General's Memorandum[1] has failed to inform the Court of the severe impact which the majority decision of the Court below has had upon the international aviation relations of the United States, and of the doubt which this decision has cast upon the reliability of the United States in abiding by the rules established by the Treaty.

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[1] Filed pursuant to the Court's Order of May 15, 1967, which reads:

"The Solicitor General is invited to file a brief expressing the views of the United States."

I.

To date, AUSTRALIA, BRAZIL, CANADA, ITALY, THE FEDERAL REPUBLIC OF GERMANY, THE NETHERLANDS and THE UNITED KINGDOM, have each officially protested to the Government of the United States that the majority decision of the Court below is contrary to their agreement with the United States as expressed in the Treaty.

All of these nations participated in the drafting of the original Treaty. They know that the imposition of the sanction in Article 3 (2) was intended to be limited to cases of non-delivery of the passenger ticket. They know that this intent is clearly expressed in the Treaty. The Government of the United States also knows it. Otherwise, why did the United States urge, in 1955, that the Treaty be amended so as to extend the scope of the sanction to cases of failure to give notice?

II.

The Solicitor General's Memorandum overlooks the views of the United States as expressed by its official representatives at the Hague Conference in 1955 where several amendments to the Warsaw Convention were then being considered. At that time, the United States sought and achieved an amendment to the Treaty to extend the sanction in Article 3 (2) to cases where the passenger ticket fails to include notice that the limits of liability may be applicable.[2]

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[2] I INTERNATIONAL CONFERENCE ON PRIVATE AIR LAW, ICAO Doc. 7686-LC/140 p. 134 (1955). The Hague Protocol amending the Warsaw Convention in this and other respects has never been ratified by the United States, nor does it appear probable that it ever will be ratified. See, S. EXEC. DOC. H, 86th Cong. 1st Sess. (1959); S. EXEC. REPT. No. 3, 89th Cong. 1st Sess. (1965); Lowenfeld & Mendelsohn, *The United States and the Warsaw Convention*, 80 HARV. L. REV. 497, 504-516, 532-546 (1967).

If the majority decision of the Court below is correct, as urged by the Solicitor General, then the United States is made to appear to have sought and obtained a wholly unnecessary amendment to Article 3 (2) in 1955.

When the Solicitor General was a member of the Court of Appeals for the Second Circuit, he placed conclusive reliance on the official position of the Government of the United States at the Hague Conference in 1955 in deciding a question involving the proper interpretation of Article 2 of the Warsaw Convention. In *Mertens* v. *The Flying Tiger Line, Inc.*, 341 F. 2d 851 (2d Cir. 1965), *cert. denied*, 382 U.S. 816 (1965), the argument was advanced by the plaintiff that transportation performed under contract for the Military Air Transport Service of the United States Government fell within the scope of the reservation of the United States under the Additional Protocol with respect to Article 2, and, therefore, was not subject to the Warsaw Convention. In affirming the District Court's rejection of this argument, then Judge Marshall reasoned as follows:

> "The regularity of the chartering relationship between the United States and defendant gives us some cause to look upon this analytic distinction with some circumspection. *But these doubts are dispelled by the negotiations surrounding the adoption of the Hague Protocol of 1955.* See generally, International Conference of Private Air Law, The Hague, September 1955, International Civil Aviation Organization, Doc. 7686-LC/140
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> "A draft protocol was prepared by the Legal Committee of the International Civil Aviation Organization at Rio de Janeiro in September 1953 and was submitted to the Hague Conference in September 1955. It sought to amend Article 2 of the Convention to

read: 'The Convention shall not apply to * * * [c]arriage of persons, cargo and baggage for military authorities by aircraft the whole capacity of which has been reserved by such authorities.' *The natural inference from this effort to amend the Convention is that without such an amendment the Convention would be applicable to such flights, or at least those proposing the amendment thought so. . . . The unavoidable conclusion* is that the Warsaw Convention, as it is presently binding on the United States, is applicable to the flight in this suit." 341 F. 2d 851 at 853-4. (Emphasis added.)

Now, however, the Solicitor General would ignore these negotiations in a virtually identical situation, and thereby avoid an equally "unavoidable conclusion," involving the proper interpretation of Article 3 (2) of the Convention.

III.

The Solicitor General's Memorandum contends that this case is of "little prospective importance" in view of the 1966 agreement among a number of airlines (including Petitioner) to a new limit of liability of $75,000, and the form of notice of the applicability of this new limit now required by the Civil Aeronautics Board. This same argument was advanced by Respondents in their brief, and was dealt with in detail in Petitioner's reply brief at pages 3-5.

This contention is lacking in merit in view of the following factors:

1. The United States is still a party to the Warsaw Convention.

2. The basic question involved is whether the sanction in Article 3 (2) applies in the event of failure to give notice of the applicability of the limit of liability established by the Treaty.

3. This question will repeatedly arise in the future, regardless of the amount of the limitation which may be in force, and regardless of the form of notice which may be required by the Civil Aeronautics Board.

4. The question of whether the sanction of absolute unlimited liability in Article 3 (2) is to be applied for failure to give notice will recur constantly in subsequent cases where no notice has in fact been given, or where some Court concludes, as did a majority of the Court below, that the CAB approved form of notice is inadequate for one reason or another. Significantly, the CAB approved form of notice now in use is not required to be printed on the ticket, but may be set forth on a separate paper. 14 C.F.R. §221.175. A fact question as to whether a passenger actually received this slip of paper is bound to arise in many, if not most, future cases because of the holding of the majority decision of the Court below. A carrier, confronted with the contention by a passenger that he did not receive the slip of paper, will certainly include in its defense a contention that the Treaty does not require notice in any event, and that no sanction applies under the Treaty for the failure to give notice of the limitation of liability. Thus, the identical questions presented by the Petition herein are certain to arise again and again in aviation accident litigation in this country.

5. There are more than 100 cases pending today in the courts of the United States involving the Warsaw Conven-

tion and passenger tickets and baggage checks identical in form to those involved herein. Final resolution of these cases will be directly affected by the ultimate decision in this case.

6. The same form of passenger ticket and baggage check as involved herein is still in daily use throughout the world by all members of IATA and ATA.

IV.

This is not a "small print" case, as the Solicitor General's Memorandum assumes. The Petition presents basic questions involving proper interpretation of the Treaty, and as such they are important questions of federal law which have not been, but should be settled by this Court.

The Solicitor General's Memorandum ignores the legislative history of the drafting of Article 3 (2). This history demonstrates unequivocally the intent of the drafters to limit the imposition of the sanction in Article 3 (2) to cases of non-delivery of the passenger ticket. An early draft of Article 3 (2), which would have extended the imposition of the sanction to cases of failure to include the notice in the passenger ticket, was expressly considered, and after debate, rejected by the parties. See, IIème Conférence Internationale de Droit Privé Aérien, ICAO Doc. 7838, pp. 100-101, 129, 168 (1930); Petition, pp. 10-12.

This clear intent of the parties to the Treaty is evident from a comparison of Article 3 (2) with Articles 4 (4) and 9. The Solicitor General's Memorandum treats lightly of the significant distinction between these related articles, and purports to distinguish *Grey* v. *American Airlines, Inc.*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F. 2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956) on this

point. In a "carefully prepared opinion" adopted by the Court of Appeals, District Judge Noonan analyzed the distinction between Articles 3 (2) and 4 (4) and 9, and concluded that the parties clearly intended that the imposition of the sanction in Article 3 (2) be limited solely to cases of non-delivery of the passenger ticket. Judge Noonan stated:

> "Article 3 (2) merely requires that the ticket be delivered to the passenger and thus clearly differs from Articles 4 (4) and 9. *I must conclude that this omission or difference is most significant.* For I cannot agree with plaintiffs' argument that Article 3 (2) intends that the ticket delivered contain the items set forth in Article 3 (1), when those who drafted the treaty were so explicit in this regard in Articles 4 (4) and 9." 95 F. Supp. 756 at 758. (Emphasis added.)

CONCLUSION

The substantial error of the majority decision of the Court below, and the necessity for review by this Court, are best expressed in the words of Judge Moore:

> "The majority do not approve of the terms of the treaty and, therefore, by judicial fiat they rewrite it. They think a 'one-sided advantage' is being taken of the passenger which must be offset by a judicial requirement that the passenger have notice of the limitation of liability.
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> * * * * *
>
> Judicial predilection for their own views as to limitation of liability should not prevail over the limitations fixed by the legislative and executive branches of Gov-

ernment even though this result is obtained by ostensibly adding to the treaty a requirement of actual understanding notice." (R. 74a-75a; Appendix B, pp. 24-25).

Notwithstanding the view advanced by the Solicitor General's Memorandum, the questions presented herein should be decided finally by this Court.

Respectfully submitted,

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July 18, 1967

Certificate of Service

I hereby certify that I have, this 18th day of July, 1967, served the foregoing reply brief upon respondents, and upon the International Air Transport Association, the Air Transport Association of America, and the United States, *amici curiae,* by depositing same in a United States mail box at One Rockefeller Plaza, New York, New York 10020, with first class postage prepaid, addressed to the respective attorneys of record as follows:

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July 18, 1967

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